89-1588

Supreme Court, U.S.
FILED
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NO_____

CURTIS L. WRENN
P. O. Box 203
Fort Drum, NY 13603,

Petitioner.

vs

STATE OF OHIO, MEDICAL COLLEGE OF OHIO; BOARD OF TRUSTEES, MEDICAL COLLEGE OF OHIO
3000 Arlington C.S. 10008
Toledo, OH 43699,

Respondents,

BRIEF OF PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

QUESTIONS PRESENTED FOR REVIEW

This is a case in which the respondents obtained dismissal of petitioner's claims at the pre-trial level. If this Court grants the petition, it will have to decide whether the rights of the petitioner were abridged by the lower courts' decisions. More specifically:

1. Whether the District Court abused its discretion when it granted summary judgment to the respondents?

2. Whether the decisions in this case are contrary to decisions of this Court and the other circuit courts of appeals?

3. Whether the district court's decision that "Plaintiff may not rely on the EEOC determination as it is not evidence of a material fact" is an abuse of discretion?

4. Whether summary judgment in favor of the defendants was appropriate in this case where the "intent" to discriminate was

the primary issue?

5. Whether the EEOC's determination that the employer had discriminated against the petitioner on three occasions, coupled with his affidavit, resume and correspondenced showing that he applied for various jobs and was rejected, was sufficient to overcome the district court's assertion that "... the Court has been unable to determine from the record before it that any evidence exists which could support plaintiff's claims"?

6. Whether the refusal of the public employer to interview the petitioner for three jobs which he was qualified constitutes a violation of due process?

7. Whether the court of appeals' allegation that "Wrenn also failed to set forth any specific facts from which discrimination could be inferred" is clearly erroneous considering the EEOC's determination and other facts of records?

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OPINIONS DELIVERED IN THE CASE

1. The petitioner filed a charge of unlawful employment practices with the EEOC. That Federal agency rendered a finding that the petitioner had been unlawfully denied employment on at least three occasions. See Appendix H.

2. Petitioner filed a complaint in the district court. That court granted summary judgment in favor of the employer. App C.

3. The district court's decision of November 30, 1988 was appealed to the Sixth Circuit. The CA denied the appeal on November 27, 1989. App B.

4. A petition for rehearing was filed on December 5, 1989 and was denied on January 8, 1990. App G and A.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Title 28, United States Code, Sections 1254(1), 1651 and 1915. This Court is being asked to review the continuing denial of equal employment opportunity to the petitioner by present and former employees of the State of Ohio.

Jurisdiction is also invoked under the Constitution and laws of the United States, including but not limited to the First and Fourteenth Amendments, and Title VII of the Civil Rights Act of 1964, as amended. More specifically, the Court is being asked to promulgate guidelines regarding the admissibility as evidence in the federal courts of investigations and findings of the U. S. Equal Employment Opportunity Commission.

The jurisdiction of this Court is also invoked to review the actions of the lower courts, in that they have made decisions

which are contrary to decisions of this Court and the other courts of appeals. Moreover, the decisions, if left standing, will invalidate a mandate of Congress, i.e., The Equal Employment Opportunity Act of 1972. More importantly, it will discourage citizens who have been discriminated against by being denied equal employment opportunity from attempting to resolve their grievance by resorting to the EEOC.

This Court is being asked to review the decisions of the district court and the court of appeals, in that both courts have made decisions against the petitioner without considering the facts and applicable caselaw. If this decision is permitted to stand it will further encourage employers throughout America to continue their practice of denying the petitioner equal employment opportunity.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law ... abridging the freedom of speech ...; or the right of the people to peaceably ... to petition the Government for a redress of grievances.

United States Constitution, Amendment V:

> Nor shall any person ... be deprived of life, liberty, or property, without due process of law ...

United States Constitution, Amendment XIV:

> Nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. The petitioner was formerly employed by the State of Ohio from December 1979 to December 1980, when he, without being charged and without any prior warning notice or explanation, was summarily removed from the position of Superintendent. The petitioner filed a charge of unlawful discrimination with the EEOC. A determination was rendered that the firing was racially motivated in response to the petitioner's refusal to drop an earlier charge. See Sup. Ct. Docket Nos 88-6494 and 89-969.

2. This case concerns the petitioner's allegation that he applied for various positions which the employer had advertised that it was seeking applicants with his qualifications. He met the stated requirements, but despite his qualifications he was not interviewed nor hired. See Appendix I.

3. The petitioner has alleged that he

was denied employment because of his race (Negroid), age (date of birth February 14, 1930) and retaliation (because of his previous opposition to the employment practices of the State of Ohio). The basis for his allegation is that in each case a younger less qualified caucasian was hired. See Appendix H ,I, J, K and L.

4. The employer has alleged that the petitioner was not hired for legitimate nondiscriminatory reason. More specifically, the employer has articulated the following reasons for not hiring him:

a, Executive Director. The employer stated "... it was established that in search for an executive director part of the criteria would be having an M.HA or M.BA degree ... Wrenn did not possess a MBA." No mention was made of the fact that the petitioner has a M.H.A. See Appendix I.

b. Administrative Assistant. The employer stated the "position was a

"secretarial type" position for which Wrenn would have been overqualified. The question to the Court is whether "overqualification" is a legitimate reason for denying a Negroid citizen a job?

c. Assistant to the President.

The employer alleges that the position "was filled by an individual who more closely met the needs of MCO" without producing ANY admissible evidence to support its allegation.

The employer above articulated reasons were contained in various arguments advanced by the counsel for the defendants, and were not supported by an admissible evidence such as resumes, job applications or affidvits from hiring officials of the State of Ohio.

REASONS FOR GRANTING WRIT

ARGUMENT I - FACTUAL EVIDENCE

1. The district court's assertion that "... the Court has been unable to determine

from the record before it that any evidence exists which could support plaintiff's claims" (App C) is clearly erroneous. The court conveniently ignored the admissible evidence at Appendix H, I, J, K and L. Thus the decision falls within the "clearly erroneous standards" articulated by this Court in Anderson v. City of Bessemer City, 470 U.S. - (1985); Pullman-Standard v. Swint, 456 U.S. 273 (1982); United States v. United States Gypsum Co., 333 U.S. 364 (1948).

2. The employer's assertion that the petitioner was not hired as Executive Director because he did not have a "M.BA" when the requirement was "M.HA or M. BA" is clearly erroneous. The petitioner was formerly employed by the State of Ohio and his personnel file clearly demonstrated that he had a M.H.A. from the Medical College of Virginia. Moreover, the petitioner's affidavit at Appendix I was clearly before the

district court. Also, Plaintiff's Proposed Findings of Fact and Conclusions of Law (App J) and the Trial Brief of Plaintiff (App K) were also before the district court. Thus the question is how did the district court decide in favor of the employer by deciding "he has completely failed to set forth any specific facts ..."? (App C). The district court apparently would have us believe that Plaintiff's Affidavit (App I) is not fact nor admissible evidence. That petitioner's pleadings with exhibits do not constitute fact or admissible evidence.

3. This Court is being asked to decide that "overqualification" (for the position of Administrative Assistant) is NOT a legitimate business reason for denying a Negroid American a position which he makes an application for employment.

4. The employer's assertion that the petitioner was denied the position of Assistant to the President because the

position "was filled by an individual who more closely met the needs of MCO" is not a reasonably specific reason to deny an applicant employment nor does it meet the requirements of this Court in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254, 101 S. Ct. 1089, 1094, 67 L.Ed.2d 207 (1981). Moreover, the employer's statement was not supported by any facts and/or admissible evidence.

5. The district court's assertion that "Plaintiff may not rely on the EEOC determination as it is not evidence of a material facts" is contrary to decisions of this Court and the other circuit courts of appeals. See, e.g., Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 210, 93 S. ct. 364, 367, 34 L.Ed.2d 415 (1972); Plummer v. Western International Hotels, Inc., 656 F.2d 502, 26 F.E.P. 149 (9th Cir., 1981); and Blizzard v.Fielding, 572 F.2d 13, 17 F.E.P. 149 (1st Cir., 1978).

Thus the writ of certiorari should be granted if for no other reason that the Sixth Circuit Court of Appeals has rendered a decision in conflict with decision of another United States court of appeals on the same matter, or has sanctioned such a departure by the district court, as to call for an exercise of this Court's power of supervision.

ARGUMENT II - PRIMA FACIE CLAIM

1. This Court has promulgated a trilogy of Title VII cases defining the burden of proof in disparate treatment cases: McDonnell Douglas v. Green, 411 U.S. 792 (1973); Furnco Construction Corp. v. Waters, 438 U.S. 577 (1978); and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

2. This Court has held that a complainant establishes a prima facie case by showing (i) that he belongs to a racial

minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that despite his qualifications, he was rejected and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. In the instant case, the district court held that the plaintiff did not establish a prima facie case, despite the facts in the case demonstrating that ALL the requirements for a prima facie case of this Court were met. App H, I and J.

3. The Court should grant certiorari to review the order and allocation of the burdens of proof set down in the appellate decision and the decision of the district court. The petitioner should be given an opportunity to show that the employer's reasons for refusing to hire him were a pretext for racial discrimination.

4. Based on the foregoing, the lower

courts' assertion that the petitioner did not and could not establish a prima facie claim, is clearly erroneous. The facts in the case, as demonstrated by Appendix H through K, clearly show the petitioner's qualifications, that he responded to the employer's advertisements seeking applicants with his background, that he met the requirements for each position, but despite his qualifications he was not interviewed nor hired for any of the three position. Of particular note in this case is Appendix L where another judge in the same district court states that "Many of the following complaints arise out of the alleged detrimental publicity (by the State of Ohio) making petitioner attempts to seek employment in related mental health fields unsuccessful in the state." This statement clearly demonstrates a prima facie case of retaliation (for the petitioner's previous

opposition to the unlawful employment practices of the State of Ohio.)

ARGUMENT III- SUMMARY JUDGMENT INAPPROPRIATE

1. The district court granted summary judgment in this case allegedly because "the Court has been unable to determine from the record before it that any evidence exists which could support plaintiff's claims." For some unknown reason the lower courts' decisions did not mention plaintiff's facts and/or arguments at Appendix D through L. Despite these facts and arguments (with incorporated exhibits), the lower courts would hsave us believe they have been "unable to determine from the record before it that any evidence exists which could support plaintiff's claims."

2. The admissible evidence presented by the plaintiff (App D through K) clearly demonstrated that he had been denied equal employment opportunity by the employer. A

review of the record in this case will clearly demonstrate that the standards for granting summary judgment were not adhered to by the district court.

3. The party moving for summary judgment has the burden of clearly establishing the lack of any triable issue of fact by the record properly before the court. See, e.g., Bell v. Cameron Meadows Land Co., (CA 9th cir. 1982) 669 F.2d 1278.

4. Where conflicting inferences may be drawn from the evidence before the court on a motion for summary judgment, the court must draw those inferences against the movant and in favor of the non-movant. See, e.g., United States V. Diebold, Inc., 369 U.S. 654, 82 S. Ct. 993, 8 L.E. 2d 176 (1962). Moreover, it has been recognized that summary judgment is particularly inappropriate in the context of employment discrimination retaliation claims. See, e.g., Romero v. Union Pacific R.R., 615 F.2d

1303, 22 F.E.P. 338, 343 (10th Cir., 1980); Keys v. Lutheran Family Services, 668 F.2d 356, 29 F.E.P. 253, 254-255 (8th Cir., 1981).

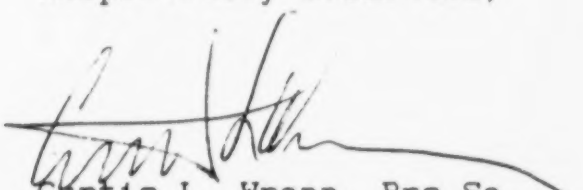
5. Based on the foregoing, the employer has not established the lack of any triable issues and thus was not entitled to summary judgment in its favor. Where, as here, the movant has not sustained this burden, summary judgment is not warranted. See, e.g., Adickes v. S.H. Kress & Co. (1970) 398 U.S. 144, 161, 90 S Ct 1598, 26 L Ed2d 142.

CONCLUSION

The decisions of the lower courts are contrary to the Constitution and laws of the United States, as interpreted by this Court and courts in the other circuits.

Based on the foregoing, the Petition for Writ of Certiorari should be granted, and this case should be remanded to the district court for a fair hearing to give the petitioner an opportunity to demonstrate that the refusal to hire him for the three positions at issue in this case was a prextext to mask the continuing unlawful employment practices by agencies of the State of Ohio.

Respectfully submitted,



Curtis L. Wrenn, Pro Se
P. O. Box 203
Fort Drum, NY 13603
Tel: (315) 772-7817

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition for writ of certiorari was mailed to The Attorney General, State of Ohio, State Office Tower, 30 East Broad Street, Columbus, OH 43215, via first class U.S. mail, postage prepaid, on April 6, 1990.

Curtis L. Wrenn

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NO_____

CURTIS L. WRENN
P. O. Box 203
Fort Drum, NY 13603,

Petitioner.

vs

STATE OF OHIO, MEDICAL COLLEGE OF OHIO; BOARD OF TRUSTEES, MEDICAL COLLEGE OF OHIO
3000 Arlington C.S. 10008
Toledo, OH 43699,

Respondents,

PETITIONER'S APPENDIXES

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No. 88-4188

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Jan 08, 1990

CURTIS L. WRENN,

Plaintiff-Appellant,

v.

STATE OF OHIO, MEDICAL COLLEGE OF OHIO; BOARD OF TRUSTEES, MEDICAL COLLEGE OF OHIO,

Defendants-Appellees

ORDER

BEFORE: MARTIN and BOGGS, Circuit Judges; and ZATKOFF*, United States District Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

*Hon. Lawrence P. Zatkoff sitting by designation from the Eastern District of Michigan

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

NOT FOR PUBLICATION

No. 88-4188

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CURTIS L. WRENN, Plaintiff-Appellant,	)	Nov. 27, 1989
v.	)	ON APPEAL FROM THE STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO
STATE OF OHIO, MEDICAL COLLEGE OF OHIO, BOARD OF TRUSTEES, MEDICAL COLLEGE OF OHIO, Defendants-Appellees.	)	

BEFORE: MARTIN and BOGGS, Circuit Judges; and ZATKOFF, District Judge.*

PER CURIAM. Curtis L. Wrenn, a black male born in 1930, appeals pro se the district court's grant of summary judgment to the Medical College of Ohio and its Trustees (MCO) on his race, age, and retaliatory discrimination claims.

*The Honorable Lawrence P. Zatkoff, United States District Judge for the Eastern District of Michigan, sitting by designation.

For the reasons set forth below, and in the well-reasoned opinion of the district court, we affirm.

Between August 1981 and January 1982, Wrenn applied for four management or executive position with MCO. He was not hired for any of the four positions. Three of the positions were filled; one was not filled. MCO contends that the three positions filled went to persons who had education and experience more suited to the positions than did Wrenn.

Wrenn filed suit in the United State District Court for the Northern District of Ohio against MCO on April 30, 1982. He alleged employment discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. Subsection 621 et seq., and Titles VI and VII of the Civil Rights Act, 42 U.S.C. Subsection Subsection 2000d and 2000e et seq. In particular, he alleged that he was not hired for these four positions because of his age and race, and in retaliation for filing previous civil rights actions against other state of Ohio entities.

The District Court had some doubt whether Wrenn could make out a prima facie case of discrimination on the grounds of age. See Blackwell v. Sun Electric Corp., 696 F.2d 1176 (6th Cir. 1983). Wrenn also failed to set forth any specific facts from which discrimination could be inferred. Wrenn's pleading and supporting materials were replete with assertions of discrimination. Yet, when deposed, Wrenn failed to offer specific examples of discrimination except for the fact that he was not hired.

As correctly analyzed by the District Court, even if Wrenn could make a prima facie case, he offered no evidence to overcome MCO's legitimate, non-discriminatory reason for not hiring him, namely that others had better experience or education. The record demonstrates that persons hired for these positions had qualifications comporting with the qualifications advertised. Thus, the district court granted summary judgment to MCO.

Viewing the evidence in the light most favorable to Wrenn, we find no error in the grant of summary

judgement to MCO. We therefore affirm.

A TRUE COPY
Attest:
LEONARD GREEN, Clerk
/s/J. Brock
Deputy Clerk

ISSUED AS MANDATE: January 16, 1990
COSTS: None

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Curtis L. Wrenn,

Plaintiff

Case No. C82-256

vs.

State of Ohio, Medical College of Ohio, et al.,

Defendants

OPINION AND ORDER

POTTER, J.:

This cause is before the Court on defendants' motion for summary judgment, plaintiff's opposition and cross motion for summary judgment, and defendants' reply. Defendants have moved for summary judgment on plaintiff's claims for violations of Title VII and the Age Discrimination in Employment Act, 29, U.S.C. Subsection 621 et seq. Plaintiff claims that defendants refused to hire him for several positions for which he was qualified because of his age, race and/or in retaliation for engaging in protected activity under Title VII.

Under the Federal Rules of Civil Procedure, summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to

> judgment as a matter of law. Fed. R. Civ. P. 56(c). The Supreme Court has recently stated that the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Ander v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2512 (1986)... . In reviewing a motion for summary judgment, however, all inferences "'must be viewed in the light most favorable to the party opposing the motion.'" See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 106 S. Ct. 1348, 1356-57 (1986) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)).

Ralph Shrader, Inc. v. Diamond International Corp., 833 F.2d 1210, 1213 (6th Cir. 1987).

The party moving for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any' which [he] believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The substantive law of the case identifies which facts

are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Therefore, only disputes of facts affecting the outcome of the suit under the applicable substantive law will preclude the entry of summary judgment. Id. A moving party may discharge its burden "by 'showing' - that is, pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 324-325. Where the moving party has met its initial burden, the adverse party "must set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 250. "[P]laintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor." Id. at 257.

A plaintiff may establish his prima facie case of age discrimination using the criteria set forth in McDonnell Douglas v. Green, 411 U.S. 792 (1973), for establishing a prima facie case under Title VII. Blackwell v. Sun Electric Corp., 696 F.2d 1176, 1180 (6th Cir. 1983). Similarly,

plaintiff may establish his prima case for retaliation under Title VII using a modified version of the McDonnell Douglas analysis. A plaintiff may also establish his case by direct or circumstantial evidence. Blackwell, 696 F.2d at 1180.

Defendants assert that plaintiff has failed to present any evidence in support of his claims. The moving party may discharge its burden on summary judgment by pointing out to the Court that there is an absence of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 324-325. In reviewing the pleading, depositions, affidavits and other matters submitted in support of and opposition to summary judgment, the Court has considered that plaintiff is a pro se litigant. Notwithstanding plaintiff's lack of legal training and viewing all materials most favorably for plaintiff, the Court has been unable to determine from the record before it that any evidence exists which could support plaintiff's claims. Although plaintiff has adequately set forth various legal doctrines under which he could possibly prevail, he has completely

failed to set forth any specific facts from which a trier of fact might return a verdict in his favor.

Plaintiff may not rely on the EEOC determination as it is not evidence of a material fact. Plaintiff's bare assertion that he was not hired because of retaliation is not sufficient to overcome a properly supported motion for summary judgment. Even if the court were to assume plaintiff had established a prima facie case, which it cannot, plaintiff has failed to present specific facts in opposition to defendants' asserted nondiscriminatory reasons for not hiring him. Accordingly, the Court finds the evidence so one sided that defendants must prevail as a matter of law.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that defendants' motion for summary judgment be, and hereby is, GRANTED: and it is

FURTHER ORDERED that plaintiff's cross motion for summary judgment be, and hereby is, DENIED.

/s/John W. Potter
United States District Judge

I hereby certify that this instrument is a true and correct copy of the original on file in my office.
Attest: James S. Gallas, Clerk
U.S. District Court
Northern District of Ohio

By: /s/Carol J. Rizuy
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR NORTHERN DISTRICT OF OHIO

CURTIS L. WRENN,

Plaintiff, Civil C 82-256

vs JUDGE POTTER

STATE OF OHIO, MEDICAL COLLEGE OF OHIO, ET AT.,

Defendants.

PLAINTIFF'S REPLY TO COURT'S ORDER OF JULY 1, 1988

Pursuant to the Order of the Court of July 1, 1988, the plaintiff respectfully submits the following:

I. BACKGROUND:

1. This is an action filed by a Negroid American citizen against officials and an institution of the State of Ohio. Plaintiff has alleged, and now realleges, that he has been denied rights, privileges and immunities secured to all Americans by the Constitution and laws of the United States, including but not limited to the First and Fourteenth Amendments; and 29 USC 621 et seq., and 42 USC 1981, 1983, 1985, 2000d, 2000e, and 2000e-3(a).

2. More specifically, the plaintiff has alleged

that the employer advertised that it was accepting applications from persons with his education, qualifications and experience; that he responded to each advertisement by submitting his resume for consideration for no less than five applications; but despite meeting the employer's stated qualifications and/or job requirements he was not hired. The plaintiff has and continues to allege that the employer used subjective hiring practices and procedures to repeatedly deny him equal employment opportunity. See Watson v. Forth Worth Bank & Trust, Sup Ct, No. 86-6139, June 29, 1988; Griggs v. Duke Power Co., 401 U.S. 424; Domingo v. New England Fish Co., 727 F.2d 1429 (C.A. Wash 1984); and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

II. TRIAL BY JURY:

Plaintiff respectfully requests that the legal issues in this case be tried by a jury of his peers as is provided for by the Seventh Amendment to the Constitution of the United States and the Age Discrimination in Employment Act (ADEA).

III. EXHAUSTION OF ADMINISTRATIVE REMEDIES:

1. The plaintiff submits that his claims under Titles VI and VII of the Civil Rights Act of 1964, and the ADEA are properly before this Court, on the basis that he filed a timely administrative charge in which he alleged that he was denied equal employment opportunity because of his race (Negroid), age (date of birth February 14, 1930), and retaliation (for his opposition to employment practices made unlawful by the Constitution and laws of the United States.) More specifically, the plaintiff filed his Title VI administrative complaints with the U.S. Departments of Education and Health and Human Services (Exhibits 1 and 2). The plaintiff filed his Title VII and ADEA charges with the Ohio Civil Rights Commission and the U.S. Equal Employment Opportunity Commission (EEOC) (see Exhibit #3).

2. The EEOC conducted its statutorily required investigation and rendered a finding that on at least three occasions the employer denied plaintiff equal employment opportunity. See EEOC charge

number 052823361, 052821864 and 052821176 at Exhibit #3. See also Exhibit #1, page 14 and 15.

3. Plaintiff moves the Court to exercise its discretion and give "great deference" to the three decisions on "probable cause" rendered by the EEOC. See Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 210, 93 S. Ct. 364, 367, 34 L.Ed. 2d 415 (1972).

IV. DEFENDANTS IN THIS ACTION:

1. The plaintiff submits that Richard D. Ruppert, the Board of Trustees, the Medical College of Ohio, and the State of Ohio are proper defendants in this case. More specifically, Defendant Ruppert made the decision to hire the Executive Director on behalf of the Board of Trustees. See Exhibit #3, page 1, 4, 5 and 8.

2. Although Ruppert was not named in the charge filed with the EEOC, he was aware of the charge filing and more importantly he was involved in the hearing process. Thus even though Ruppert was not named as a respondent in the administrative charge, that fact alone is not a legitimate basis for not

including him as a defendant in this case. A Title VII complaint can be brought against persons not named in complaint filed with EEOC as long as they were involved in acts giving rise to EEOC claims. See e.g., Wrighten v. Metropolitan Hospitals, Inc. 726 F.2d 1346 (CA OR 1984). Also, and what is more important in this case, a plaintiff need not allege exhaustion of administrative remedies for claims of retaliation which is at the heart of this action. See e.g., Gupta v. East Texas State University, 654 F.2d 411 (5th Cir. 1981).

3. Unlike Ruppert, the Board of Trustees was named in the administrative charge filed with the EEOC, DHHS and Education. See Exhibit #1, page 11. The fact that the EEOC may not have served the Board of Trustees with a copy of the charge is not a legitimate basis for the Board not to be included as a defendant. The Board is the policy making entity for the Medical College of Ohio and therefore cannot separate itself from the latter. See e.g., Kissi v. Wriston, 584 F. Supp 55 (DC MD 1983); Mickel v. South Carolina State Employment Service, 377 F.2d

239 (4th Cir), cert. denied, 389 U.S. 877, 88 S. Ct. 177, 19 L. Ed.2d 166 (1967).

V. DISCOVERY:

Plaintiff moves the Court for permission to conduct additional discovery, including but not limited to serving additional interrogatories, requests for production of documents and to depose potential witnesses in this case.

Respectfully submitted,

/s/Curtis L. Wrenn
Curtis L. Wrenn, Pre Se
P. O. Box 1691
Albany, NY 12201
Tel: (518) 477-2508

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was mailed to the Assistant Attorney General, State Office Tower, 30 East Broad Street, 26th Floor, Columbus, OH 43215, via U.S. mail, postage prepaid, on the 27th day of July, 1988.

/s/Curtis L. Wrenn
Curtis L. Wrenn

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

CURTIS L. WRENN

Plaintiff,

vs

STATE OF OHIO, MEDICAL COLLEGE OF OHIO,

Case No C82-256

JUDGE POTTER

Defendants,

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

COMES NOW the plaintiff and submits this memorandum in opposition to the defendants' motion for summary judgment and his cross-motion for summary judgment in his favor. As a basis for his memorandum plaintiff respectfully submits that the defendants should not be granted summary judgment in connection with the plaintiff's race and age claims. As will be argued below there are issues yet to be resolved regarding these two claims. However, it is undisputed that the defendants have retaliated against the plaintiff, and this is the basis for the plaintiff's cross-motion.

1. Summary Judgment

(1) the EEOC has determined that on least three occasions the defendants have violated Title VII by denying the plaintiff equal employment opportunity. See Exhibit 2.

(2) Although the findings and determinations of the EEOC are not binding upon the federal courts and their admissibility is discretionary with the courts, federal courts have given weight to such findings. Such determinations by the EEOC are entitled to "great deference" and may be "significant evidence". See, Hilton v. Wyman Gordon Co., 624 F. 2d 379, 383 (1st Cir. 1980). See also, General Electric Co. v. Gilbert, 429 U.S. 125, 97 S. Ct. 401 50 L.Ed. 2d 343 (1976), and McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279, 96 S. Ct. 2574, 49 L. Ed. 2d 493 (1976).

(3) Based on the facts in this case, the granting of summary judgment to the defendants would clearly be erroneous. Under Rule 56, FRCP, the burden is on the movant to demonstrate clearly that there is no genuine issue of fact. Any doubt as to

the existence of such an issue is resolved against him. Unless the moving party can demcnstrate his entitlement beyond a reasonable doubt summary judgment must be denied. See e.g., Adickes v. S.H. Kress & Co., 398 U.S. 144, 157-59, 90 S. Ct. 1598, 1608-1609, 26 L.Ed. 2d 142 (1970); Norton v. Liddell, 620 F.2d 1375, 1381 (10th Cir. 1980). In the case at bar the defendants have not demonstrated beyond a reasonable doubt that there are no genuine issue of fact.

2. Retaliation

(1) Plaintiff's core complaint is continuing acts of retaliation by employees, agents and officials of the State of Ohio. More specifically, the plaintiff has been denied equal employment opportunity because of his previous opposition to employment practices made unlawful by the Constitution and laws of the United States, and for his participation in legitimate activities to protest unlawful employment practices and treatment practices rendered to the mentally ill. Plaintiff's "opposition" has included but not limited to filing

charges of discrimination with the EEOC, and his "participation" has included but not limited to participating in investigations conducted by the EEOC and court proceedings of various federal courts.

(2) A legion of court decisions have held that the denial of equal employment opportunity because of a person exercising a right promulgated by Congress, is a violation of 29 USC 623(d), and 42 USC 1981, 1983 and 2000e-3(a).

(3) The primary reason plaintiff was not hired for any of the jobs which he applied is because he had protested unlawful employment practices. One purpose of Section 704(a) (42 USC 200e-3(a)) is "to protect the employee who utilizes tools provided by Congress to protect his rights." See, Pettway v. American Cast Iron Pipe Company, 411 F. 2d 998, 1005 (5th Cir 1969). However, Section 704(a) is not confined to situations in which the parties are engaged in formal proceedings, but rather extends to forbid "discrimination against applicants or employees for attempting to protest or

correct allegedly discriminatory condition of employment." See, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 796, 93 S. Ct. 1817, 1821, 36 L.Ed. 2d 668 (1972).

(4) The requisite elements of a prima face case of retaliatory discrimination in violation of 29 USC 623(d) and 42 USC 1981 and 2000e-3(a) are:

> (1) that he (plaintiff) engaged in a protected activity (such as filing an EEOC charge); (2) that the employer knew of this protected activity; (3) that he was subsequently discharged or subjected to other damages; and (4) that the employer had a retaliatory motive or that the timing of its action was such as to allow an inference of retaliation to arise. Sutton v. National Distillers Products Co., 445 F. Supp. 1319, 16 F.E. P. 1031, 1037 (S. D. OH, 1978).

See, also, Aguirre v. Chula Vista Sanitary Service, 542 F.2d 779, 13 F.E.P. 1436 (9th Cir 1976); Womack v. Munson, 619 F.2d 1292 (8th Cir 1980); Smally v. City of Eastonville, 640 F.2d 765, 25 F.E.P. 1059, 1061 (5th Cir 1981); and Goff v. Continental Oil Co., 678 F.2d 593, 599 (5th Cir 1982) (for retaliation claim under 42 USC 1981).

(5) Based upon the foregoing, plaintiff

respectfully submits that his cross-motion for summary judgment on the basis of retaliation should be granted. Contrary to the defendants, the retaliation action arose under a separate provision of Title VII and has a somewhat different factual basis. It is clear that retaliation need not be the sole motivation behind the adverse action, but is required only to be a reason for the action. The "reason" is demonstrated by the fact that plaintiff was allegedly denied employment for one position because he was "overqualified" and for other positions because "others were more qualified". The defendants have produced NO evidence to dispel inference of retaliation raised by the plaintiff. See, Cohen v. Fred Meyer, Inc., 686 F.2d 793 (CA OR 1982).

(6) Finally, plaintiff submits that his claim of unlawful retaliation is not barred as a matter of law by a finding that the employer's employment practices were not unlawful. See, Parker v. Baltimore & O.R. Co., 1981, 652 F.2d 1012 209 U.S. App. D.C. 215, on remand 555 F. Supp. 1182.

Moreover, plaintiff submits that he need only establish that retaliation played ANY PART in his nonselection in order to prove his claim of retaliatory discrimination. This concept is followed by courts in numerous jurisdiction. For instance, the court in United States v. Hayes Int'l Corp., 6 F.E. P. Cases 1328, 1330 (S.D. Ala 1973), aff'd 507 F.2d 1279 (8th Cir 1975) held that:

> "... claims of ... retaliation are not to be viewed in terms of the degree to which they might or might not have been a factor in challenged actions and must instead be viewed by the Court in terms of whether they played any part at all in such actions."

3. Age Claim

The argument of the defendants' counsel that the plaintiff was denied employment because he was overqualified is not supported by the facts in this case. See Exhibit 1 which demonstrates that at NO time has the employer alleged that plaintiff was overqualified. In addition, the argument of the counsel that the employer was not aware of the plaintiff's age is refuted by Exhibit 3 which clearly demonstrates that plaintiff's age was a

matter of public record and public information. Moreover, the counsel's argument must fail pursuant to the holding of the Sixth Circuit in Davis v. Combustion Engineering, Inc., 742 F.2d 915 (1984) where the Court held:

> "In using the phrase "admissible evidence," the Supreme Court in Burdine was simply indicating that a defendant could not meet its burden by advancing an "articulation," such as the answer to a Complaint or the argument of counsel, which could not be admitted as evidence. ..."

4. Race Claim

(1) The defendants' argument for summary judgment on plaintiff's race claim must also fail, for the same reason as the age argument above. In addition, the argument at page 11 of the Defendants' Motion for Summary Judgment that "In addition, it was established that in searching for an executive director part of the criteria would be having an M.HA OR M.BA degree ..." must also fail, in that the defendants have not demonstrated that the job qualifications were established as a matter of law and/or that those qualifications were needed. See Domingo v. New England Fish Co., 727 F.2d 1429 (CA

WA 1984).

(2) The defendants have attempted to mislead the Court by alleging that the plaintiff did not have an M.BA or M.HA. It is interesting to note that the plaintiff met the published requirements for each and every job which he applied. It is unrefuted that the plaintiff's various applications for employment clearly demonstrated that he was qualified for every position he applied, including but not limited to the fact he received his MHA from the Medical College of Virginia-Virginia Commonwealth University. See Exhibit 4.

(3) Accordingly, Rule 11 sanctions should be imposed on the counsel for the defendants for consistently making misleading declarations to this Court. The latest misleading statement at page 4 is inexcusable considering the fact that plaintiff's education is fully documented in the files of the State of Ohio and in this Court. Thus the misleading statement was intentionally made to influence the decision of this Court, while knowing the statement was inaccurate or at best misleading.

WHEREFORE, plaintiff prays that the Court will deny the defendants' motion for summary judgment and will grant his cross-motion for summary judgment.

Respectfully submitted,

/s/Curtis L. Wrenn
Curtis L. Wrenn, Pro Se
P. O. Box 1691
Albany, NY 12201
Tel: (518) 477-2508

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was mailed to Beverly Yale Pheiffer, Esq., 30 East Broad Street, Columbus, OH 43266-0410, this 7th day of September, 1988, postage prepaid.

/s/Curtis L. Wrenn
Curtis L. Wrenn

AFFIDAVIT

I, Curtis L. Wrenn, hereby certify and affirm that the statements contained above are true to the best of my knowledge and belief.

Sworn and subscribed to before me this 7th day of Sep. 1988.

/s/Curtis L. Wrenn
Curtis L. Wrenn

/s/Richard W. Bennett
NOTARY

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CURTIS L. WRENN,

Plaintiff-Appellant,

vs Case No 88-4188

MEDICAL COLLEGE OF OHIO, ET AL.,

Defendants-Appellees.

ADDITIONAL ARGUMENTS BY THE APPELLANT

COMES NOW the appellant, in response to letter from the Court of June 28, 1989, and submits the following as his additional arguments in this case.

1. This case concerns whether the district court erred in finding that the defendants articulated a legitimate nondiscriminatory reason for their failure to hire the appellant for various positions at issue in this case. As has been argued throughout this case, and as will be repeated below, the facts of record clearly demonstrate that the district court committed reversible error in this case.

2. The employer in this "mixed-motives" case, legitimate business necessity vs. the illegitimate

retaliation against the appellant for his legitimate opposition to unlawful employment practice, has not proven by a preponderance of the evidence that it would have made the same decisions even if the plaintiff was a different race (i.e., white) or if he had not previously opposed the employment practices of the State of Ohio and others. See, e.g., Price Waterhouse v. Ann B. Hopkins, cert. to U.S. CA DC Cir., Case No 87-1167, May 1, 1989, 57 LW 4470, 4473.

3. The defendants have offered no evidence to justify the difference in the treatment of the plaintiff's applications, i.e., refusal to consider him for any of the positions which he qualified. Instead the employer has offered two contradictory excuses for refusing to hire the plaintiff. In one case the employer stated the plaintiff was overly qualified. In another the employer stated the plaintiff did not have an "MBA" when its advertisement clearly stated "an MBA/MHA". The plaintiff's applications clearly indicated an MHA from the Medical College of Virginia-Virginia

Commonwealth University. See Exhibit #2.

4. The decision of the district court is inexplicable based on the facts of record in this case. The district court apparently gave NO weight to the plaintiff's qualifications, the fact that he made timely applications for positions which the employer had stated it was seeking applicants with the plaintiff's qualifications, his affidavits or the affidavits of the EEOC, while giving GREAT WEIGHT to the self-serving affidavits of the employer's administrative staff. Appellant submits that a review of the evidence of record in this case will demonstrate that the district court misapprehended the facts and/or misapplied the law to the facts it did apprehend. As such this case falls within the teaching of Pullman Standard v. Swint, 456 U.S. 273, 287-90, 102 S. Ct. 1781, 1789-91, 72 L. Ed 2d 66 (1982), in that the district court committed reversible error when it failed to consider relevant admissible evidence. See also, United States v. United States Gypsum Co., 333 U.S. 364 (1948).

5. The appellees would have us believe that they used a facially neutral employment practice in rejecting the various applications submitted by the plaintiff. Since facially neutral practices may violate Title VII, this court is being asked to review ALL the facts in this case to ascertain whether; the appellees used a neutral employment practice when the decision was made to summarily reject the plaintiff's applications for employment. See, e.g., Domingo v. New England Fish Co., (CA Wash. 1984), 727 F.2d 1429 (intent to discriminate proved by circumstantial evidence). The "circumstantial evidence" in this case is at Exhibit #1.

6. In summary, this case falls within the recent Supreme Court's decision in Waterhouse v. Hopkins, in which the Court held:

> "This court's prior decisions demonstrate that the plaintiff who shows that an impermissible motive played a motivating part in an adverse employment decision thereby places the burden on the defendant to show that it would have made the same decision in the absence of the unlawful motive." Ibid. 57 LW 4470.

-and-

> "An employer may not, in other words, prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. ... The employer instead must show that its legitimate reason, standing alone, would have induced it to make the decision." Ib. 4476.

CONCLUSION

The plaintiff-appellant has demonstrated by a preponderance of the admissible evidence that a discriminatory motive, i.e., race and/or retaliation, was a "substantial" and/or "motivating" factor in the denial of equal employment opportunity. The preponderance of evidence is demonstrated in part by the following:

(1) Plaintiff's objective qualifications.

(2) Plaintiff's affidavits.

(3) Administrative determinations at Exhibit #1.

The defendants-appellees have submitted no admissible evidence to prove that they would have made the same decision not to hire the plaintiff even in the absence of retaliatory discrimination for his previous opposition to the employment

practices of the State of Ohio See, e.g., Waterhouse v. Hopkins; Bellissimo v. Westinghouse Elec. Corp., 764 F.2d 175, 179 (CA 3 1985), cert. denied, 475 U.S. 1035 (1986)); Bell v. Birmingham Linen Service, 715 F.2d 1552, 1557 (CA 11, 1983).

The Court should remand this case to the district court for trial, for the reason the district court's account of the evidence is not plausible in light of the record viewed in its entirety. In the event this Court declines to remend, the plaintiff-appellant asks that the Court directs and/or requests a Special Prosecutor and/or Department of Justice and/or an appropriate committee of the United States Congress to conduct an investigation and/or hold public hearings to determine whether he (the plaintiff) has been denied equal employment opportunity because of his race and/or retaliation (for his opposition to employment practices made unlawful by the Constitution and laws of the United States), as a result of the concerted actions by agencies of the United States Government, including but not limited to the Department of Justice and

Health and Human Services, and the State of Ohio.

Respectfully submitted,

/s/Curtis L. Wrenn
Curtis L. Wrenn, Pro Se
P.O. Box 203
Fort Drum, NY 13603
Tel: (315) 772-4021

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was mailed to Beverly Yale Pfeiffer, Esq., on the 8th day of July, 1989, State Office Tower, Columbus, OH, via U.S. mail, postage prepaid.

/s/Curtis L. Wrenn
Curtis L. Wrenn

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CURTIS L. WRENN,

Petitioner,

vs CASE NO 88-4188

STATE OF OHIO, MEDICAL COLLEGE OF OHIO, BOARD OF TRUSTEES, MEDICAL COLLEGE OF OHIO,

Respondents.

PETITION FOR REHEARING IN BANC

Curtis L. Wrenn, Pro Se
P.O. Box 203
Fort Drum, NY 13603
Tel: (315) 772-7817

Attorney General
State of Ohio
30 East Broad Street
26th Floor
Columbus, OH 43215

December 5, 1989

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CURTIS L. WRENN,

Petitioner,

vs Docket No 88-4188

STATE OF OHIO, MEDICAL COLLEGE
OF OHIO, BOARD OF TRUSTEES,
MEDICAL COLLEGE OF OHIO,

Respondents.

PETITION FOR REHEARING IN BANC

COMES NOW the petitioner to ask the Court to reconsider its decision of November 27, 1989 on the grounds that the Court has misapprehended the facts in this case and/or misapplied the law governing the granting of summary judgment.

1. This case centers around the clearly erroneous interpretation of the law governing the granting of summary judgment in a discrimination case involving retaliation (for the petitioner's opposition to the employment practices of the State of Ohio which have been made unlawful by the Constitution and laws of the United States, including but not limited to 42 USC 1981, 1983,

2000d and 2000e).

2. The specific issues in this case involve the denial equal employment opportunity, in that the petitioner was denied equal employment opportunity for at least three positions. That is, the employer advertised that it was seeking applicants with the petitioner's qualifications, he responded by submitting his application, but despite meeting the employer's stated qualifications he was not interviewed nor was he hired for any of the positions at issue.

3. Correspondence pertaining to petitioner's applications and his rejection by the employer is at Exhibit #1. In addition to Exhibit #1, the Court's attention is invited to the following documents of record which demonstrate inferences of discrimination by the State of Ohio:

a. Trial Brief of Plaintiff - Page 20 of Joint Appendix.

b. Plaintiff's Proposed Findings of Fact and Conclusions of Law - Pages 30-32 of Joint Appendix.

c. EEOC's Determination - Page 72 of Joint

Appendix.

d. Affidavit of Curtis L. Wrenn - page 86 of Joint Appendix.

REASONS FOR GRANTING REHEARING

A. SUMMARY JUDGMENT REQUIREMENTS NOT MET

1. The respondents did not establish conclusively that they were entitled to summary judgment. Moreover, the courts misapprehended the facts (see above) and misapplied the laws to the fact they did apprehend. The admissible evidence, above, clearly established that there were triable issues in this case and that they could not be resolved by a summary judgment motion. See, United States vs. United States Gypsum Co., 333 U.S. 364 (1948).

2. Petitioner's core complaint is that he was denied equal employment opportunity in retaliation for his opposition to unlawful employment practice. The requisite elements of a prima facie case of retaliatory discrimination are:

"(1) that he engaged in a protected

> activity (such as filing an EEOC charge); (2) that the employer knew of this protected activity; (3) that he was subsequently discharged or subjected to other damages; and (4) that the employer had a retaliatory motive or that the timing of its action was such as to allow an inference of retaliation to arise. Sutton v. National Distillers Products Co., 445 F. Supp. 1319, 16 F.E. P. 1031, 1037 (S.D. OH., 1978).

See also, Aquirre v. Chula Vista Sanitary Service, 542 F.2d 779, 13 F.E.P., 1436 (9th Cir., 1976); Womack v. Munson, 619 F.2d 1292 (8th Cir., 1980).

3. Retaliation and/or retaliatory motive can be established by direct (admissible evidence above) or circumstantial evidence (the fact that the petitioner was repeatedly denied employment without an interview, despite his qualifications). See, e.g., EEOC v. St. Joseph Paper Co., D.C. Tenn 1983, 557 F. Supp. 435.

4. It has been recognized that summary judgment is particularly inappropriate in the context of employment discrimination retaliation claims. See, e.g., Romero v. Union Pacific R. R., 615 F.2d 1303, 22 F.E.P. 338, 343 (10th Cir., 1980); Keys v.

Lutheran Family Services, 668 F.2d 356, 29 F.E.P. 252, 254-255 (8th Cir., 1981).

5. The petitioner submits that the respondents have not established the lack of any triable issues. Where, as here, the movant has not sustained this burden, summary judgment is not warranted. See, e.g., Adickes v. S. H. Kress & Co. (1970), 398 US 144, 161, 90 S. Ct. 1598, 26 L. ed 2d 142.

B. THE DECISION OF THIS COURT IS CONTRARY TO PREVIOUS DECISIONS OF THIS COURT AND CONTRARY TO DECISIONS OF THE UNITED STATES SUPREME COURT

1. This Court has upheld the District Court's contention that "Wrenn has failed to set forth any specific facts from which discrimination could be inferred." The applicable facts are restated below:

a. Exhibit #1 which demonstrates the fact that the petitioner applied and was repeatedly denied equal employment opportunity by the employer.

b. The EEOC's determination that the petitioner was unlawfully denied employment.

c. Petitioner's affidavit which demonstrates his qualifications for each position.

In that connection, the inference of discrimination is drawn from the fact that the petitioner was resident to Toledo but was not interviewed in connection with his applications, whereas the employer invited out-of-town applicants to come in for an interview.

2. Of GREAT importance in this case is this Court's prior decisions regarding the admissibility of investigations conducted by the EEOC. Although such final reports from the EEOC are not binding upon the federal courts and their admissibility into evidence is discretionary with the trial court, this Court and numerous other federal courts have recognized their value as evidence given the expertise of the EEOC in investigating and evaluating discrimination claims. See, e.g., Heard v. Mueller Co. 464 F.2d 190, 194 (6th Cir., 1972) (holding that EEOC determinations can be "highly probative"). Accord, Smith v. Universal Services, Inc., 454 F.2d 154, 4 F.E.P. 187, 188-189 (5th Cir., 1972); Plummer v. Western International Hotels, Inc., 656 F.2d 502, 26 F.E.P. 149 (9th Cir., 1981).

See, also, Blizzard v. Fielding, 572 F.2d 13, 17 F.E.P. 149 (1st Cir., 1978) (EEOC findings are entitled to "great deference").

3. Accordingly, the petitioner respectfully ask, considering Exhibit #1 and the EEOC's determination that the petitioner had been discriminated against, how could the courts hold that "Wrenn also failed to set forth any specific facts from which discrimination could be inferred."

4. The decision of the Court is contrary to the Supreme Court's decision in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252 (1981), where the court held that "A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence. See also, Bazemore v. Friday, Nos. 85-93 and 85-428, cert. to 4th Cir. CA, July 1, 1986, page 13.

5. In summary, the respondents have not met their burden under Burdine, in that they have not set forth, through the introduction of admissible

evidence, the reasons for the petitioner's rejection.

CONCLUSION

The petitioner has demonstrated by a preponderance of the admissible evidence that a discriminatory motive, i.e., race, age and/or retaliation, was a "substantial" and/or "motivating" factor in the denial of equal employment opportunity.

This Court should remand this case to the District Court for trial, for the reason the District Court's account of the evidence is not plausible in light of the record viewed in its entirety.

A review of the records in this case will clearly demonstrate that the respondents have not submitted ANY admissible evidence to refute the petitioner's contention that he was unlawfully denied equal

employment opportunity in connection with his applications demonstrated by Exhibit #1.

Respectfully submitted,

/s/ Curtis L. Wrenn
Curtis L. Wrenn, Pro se
P.O. Box 203
Fort Drum, NY 13603
Tel: (315) 772-7817

December 5, 1989

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
1375 EUCLID AVENUE
CLEVELAND, OHIO 41115

In reply refer to:

Charge Nos. 052821176
052823361
052821864

Curtis Wrenn
P. O. Box 6144
Toledo, Ohio 43614

Charging Party

Medical College of Ohio
3000 Arlington C.S. 10008
Toledo, Ohio 43699

Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue, on behalf of the Commission, the following determination as the merits of the subject. charges.

All jurisdictional requirements have been met.

Charging Party alleges that Respondent engaged in unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964, as amended by failing to hire him because of his race, Black; also retaliated 704(a) against him for filing Charge Nos. 052791758 and 052811127. The Commission concludes that there is reasonable cause to believe the

charges are true.

Evidence of record shows that on or about February 9, 1982, Charging Party applied for an Executive Director position with the Respondent. The position was advertised in The Toledo Blade newspaper, January 14, 1982 edition. On June 9, 1982, Respondent told the Charging Party that he was not selected. David J. Kolasky, Caucasian, age 41, was selected for the position, and commenced work on January 18, 1983.

Prior to that, Charging Party applied for three (3) vacant positions with the Respondent. Respondent's official sent Charging Party a letter on December 8, 1981, indicating that the position of Administrative Assistant, Department of Psychiatry, had been filled by a candidate whose educational experience and training most closely met the departmental needs. Documented evidence shows that a Caucasian female was selected for the position on December 14, 1981. Her educational background consisted of her attending the University of Toledo Community and Technical College; she expected to receive an

Associate Degree in Marketing and Management in December, 1982. Her work experience indicated that she was a secretary in the Chairman's office 1970-1974, administrative secretary to the President and Chairman of the Board 1974-1978, and assistant to the Chairman 1978-1981.

Respondent's advertisement indicated that the appointed person for the position must possess a BS or BA degree in Business Administration or related field; 3-4 years experience in a business environment. Charging Party has more than 10 years of valid hospital management experience, including Administrator of a large hospital and also a small community hospital; Associate Director of a large teaching hospital; and Chief Executive Officer of two (2) psychiatric hospitals. His education consists of a BS degree in Business Administration, a Health Service Administration Development Program certificate, and an MA degree in Hospital Administration.

Respondent's official indicated that the position of Assistant to the President, which the Charging Party

applied for, was filled by a Caucasian male. Evidence of record shows that the selectee educational background consisted of Ph.D. in English, an MA degree in Creative Writing, and a BS degree in English. He had no work experience in the health care field.

Respondent's advertisement indicated that the successful candidate for the position must have an MA degree in Public Health and experience in the health care field. Respondent gave no acceptable explanation for their action.

Based on these finding, it is reasonable to conclude that Respondent failed to hire the Charging Party because of his race, Black, and also retaliated against him for filing previous charges, which is in violation of Title VII.

Having determined that there is reasonable cause to believe that the charge is true, the Commission now invites the parties to join with it in a collective effort toward a just resolution of the matter. A "Notice of Conciliation Process" is attached for your information; a representative of the Commission

will contact each party in the near future to begin the conciliation process.

On Behalf of the Commission:

/s/Signature illegible

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

CURTIS L. WRENN,
Plaintiff

vs

STATE OF OHIO, MEDICAL COLLEGE OF OHIO, et al
Defendants

Case No. 82-256

AFFIDAVIT OF CURTIS L. WRENN

NOW COMES the plaintiff, Curtis L. Wrenn, to state the following:

I was born to King George and Viola Head Wrenn on February 14, 1930 in Emille, Alabama.

I am a graduate of A.H. Parker High School, Birmingham, Alabama. Post-high education includes various military schools prior to my retirement from the United States Army on December 1, 1970; a bachelor degree in Business from the University of Nebraska-Omaha: a certificate in health care administration from the University of Alabama-Birmingham; and a master's degree in health care administration from the Medical College of Virginia-Virginia Commonwealth University.

My professional recognition includes being elected a Fellow in the American Academy of Medical

Administrators.

My work experience in hospital and health care administration includes the following;

1. Administrator, Richmond Community Hospital, Richmond, Virginia from November 1970 to August 1973.

2. Administrative Resident, Medical Center Hospitals, Norfolk, Virginia from August 1974 to April 1975.

3. Corporate Director of Personnel, Medical Center Hospitals, Norfolk, Virginia from April 1975 to April 1976.

4. Associate Director for Administration, University of Maryland Hospital, Baltimore, Maryland from May 1976 to July 1978.

5. Administrator/Chief Executive Officer, Anoka State Hospital, Anoka, Minnesota from August 1978 to December 1979.

6. Superintendent, Toledo Mental Health Center, Toledo, Ohio from December 1979 to December 1980.

7. Self-employed health care management consultant, Minority Health Care Consultant, Inc.

from January 1981 to September 1983.

8. Executive Director, Whitney M. Young, Jr. Health Center, Inc. Albany, New York from October 1983 to present.

During the period August 21, 1981 to present I have made numerous applications for employment with the Medical College of Ohio. The applications consisted of the following:

1. My first employment application was submitted on or about August 21, 1981 to Mr. David W. Benfer. Mr. Benfer reply was "we have no openings in Hospital Administration at this time. ... Your resume will be kept on file in the event of such a vacant position in the future." A copy of this correspondence is at Exhibit A.

2. In response to advertisement in The Toledo Blade I submitted an application for each of the following positions on the date indicated:

a. Assistant to the President, on or about September 21, 1981

b. Administrative Assistant-Psychiatry Department, on or about November 1, 1981.

c. Ambulatory Care Director, on or about November 22, 1981.

After not receiving a response to my applications, I submitted a second application for the position of Assistant to the President on or about November 12, 1981. A copy of the advertisements is at Exhibit B and a copy of the second application is at Exhibit C. After not receiving a response to any of the applications, I submitted another application by certified mail on December 2, 1981, a copy of which is at Exhibit D.

3. In response to an advertisement in Hospitals I submitted an application for the position of Executive Director to Mr. John D. Ray on or about January 14, 1982. A copy of the advertisement is at Exhibit E. After not receiving a response to my application, I submitted a second application on or about February 9, 1982 to Dr. Richard D. Ruppert, a copy of which is attached as Exhibit F.

4. In response to an advertisement in The Toledo Blade I submitted an application for the position of Assistant Hospital Director on or about September 1,

1983. I was interviewed for the position on or about September 18, 1983. After not receiving any information concerning the disposition of application, I submitted an inquiry to Mr. David J. Kolasky on or about October 23, 1983. Mr. Kolasky's response was "we are continuing to interview people and will make a decision with regard to the position." To date I do not know the disposition of my application for the position of Assistant Hospital Director. A copy of the correspondence is at Exhibit G.

As a result of being denied employment and believing that the denials were racially motivated, I have filed three charges of employment discrimination against the Medical College of Ohio with the Equal Employment Opportunity Commission (EEOC), the United States Department of Education (USDE), and the United States Department of Health and Human Services (USDH & HS). The USDH&HS deferred the charges to EEOC. I do not know the disposition of the USDE. The EEOC found "reasonable cause to believe the charges are true". The Justice

Department issued a Notice of Right to Sue on or about October 6, 1983. A copy of the Notice of Right to Sue, the charges and the EEOC Determination are attached as Exhibit H. (The charge number 052822361 includes a charge of age discrimination because the person hired date of birth is January 15, 1941 and appears to be less qualified for the position of Executive Director.)

AFFIDAVIT

STATE OF NEW YORK)

) ss

COUNTY OF ALBANY)

Subscribed and sworn to before me this _____ day of June 1984.

/s/_____ _____
NOTARY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Curtis L. Wrenn,	:	
Plaintiff,	:	Case No. 82-256
v.	:	Honorable John Potter
State of Ohio, Medical College of Ohio, et al.,	:	PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
Defendants.	:	

.....

FINDINGS OF FACT

Defendant State of Ohio Medical College of Ohio (MCO) is a non-profit corporation doing business within Lucas County, Ohio. The Board of Trustees of MCO is its governing entity.

Plaintiff Curtis L. Wrenn is a black male, age 55 years, who was denied several executive level positions at MCO during 1981 and 1982, including Assistant to the President; Administrative Assistant, Psychiatry Department; Ambulatory Care Director; and, Executive Director of MCO. He is well qualified in the area of hospital and health care administration and has been employed as Executive Director at Whitney M. Young, Jr. Health

Center, Inc. in Albany, New York from October 1983 to present.

During the period August 21, 1981 to present, Curtis Wrenn made numerous applications for employment with the Medical College of Ohio. Curtis Wrenn's first employment application for an executive level position was submitted on or about August 21, 1981. Defendants' reply was "we have no openings in Hospital Administration at this time ... Your resume will be kept on file in the event of such a vacant position in the future."

Subsequently, in response to advertisements in The Toledo Blade, Curtis Wrenn applied for the position of Assistant to the President, on or about September 21, 1981, Administrative Assistant-Psychiatry Department, on or about November 1, 1981, and Ambulatory CAre Director, on or about November 22, 1981. After not receiving a response to his applications, Curtis Wrenn submitted a second application for the position of Assistant to the President on or about November 12, 1981. After not receiving a response to any of the applications,

Curtis Wrenn submitted another application by certified mail on December 2, 1981. Curtis Wrenn did receive an interview for the Ambulatory Care Director position, but was not hired.

In response to an advertisement in Hospitals, Curtis Wrenn submitted an application for the position of Executive Director on or about January 14, 1982. After not receiving a response to his application, Curtis Wrenn submitted a second application on or about February 9, 1982. In each case set forth above, Curtis Wrenn received no response to his application and/or was denied the position further, in each instance the position was filled by a white person and/or a person younger than Curtis Wrenn; and in each case, Curtis Wrenn was equally or more qualified than the person hire. Defendants allege that the position of Ambulatory Care Director was never filled.

Curtis Wrenn filed charges of intentional unlawful employment discrimination in hiring against defendant, MCO, with the Equal Employment Opportunity Commission. The EEOC found probable

cause to believe that unlawful discrimination did exist as charged by Curtis Wrenn. Defendants declined conciliation. A right-to-sue notification was issued to Curtis Wrenn on October 6, 1983 by the EEOC.

The defendants' decision(s) not to hire Curtis Wrenn were based upon defendants intentionally and maliciously retaliating against Mr. Wrenn for his having filed previous charges of unlawful race discrimination in employment and/or were based impermissibly upon Curtis Wrenn's age.

Curtis Wrenn remained unemployed from April 28, 1981 until October 17, 1983.

CONCLUSIONS OF LAW

Jurisdiction and venue are proper in this judicial district and division.

Defendants' actions in their decision(s) not to hire Curtis Wrenn constitute violations of the Civil Rights Act of 1964, 42 U.S.C. Subsection 2000e, et seq., 42 U.S.C. Subsection 2000(d), et seq. and constitute intentional unlawful retaliation against plaintiff for his assertion of his Constitutional

rights and/or defendants' actions constitute violations of ADEA, willful discrimination against Curtis Wrenn based upon his age.

As a direct and proximate result of the actions of defendants, Curtis Wrenn has suffered injury and damage for which he is entitled to compensation. Further, as a result of the intentional and malicious conduct of defendants, Curtis Wrenn is entitled to punitive damages.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was duly served upon Richard W. Ross, Assistant Attorney General, and William J. Steele, Assistant Attorney General, State Office Tower, 30 East Broad Street, Columbus, Ohio 43215, personally, this 18th day of January, 1985.

/s/James H. Banks
Trial Attorney for Plaintiff
620 Alum Creek Drive
Suite 201
Columbus, Ohio 43205
(614) 252-0752

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Curtis L. Wrenn,	:	
Plaintiff,	:	Case No. 82-256
v.	:	Honorable John Potter
State of Ohio, Medical College of Ohio, et al.,	:	TRIAL BRIEF OF PLAINTIFF
Defendants.	:	

.....

TRIAL BRIEF OF PLAINTIFF
Curtis L. Wrenn

Tommie L. Allen
316 N. Michigan Street
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and

James H. Banks
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Defendants

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I. STATEMENT OF FACTS

Plaintiff is a black male, age 55. He is well qualified in the area of hospital and health care administration and has been employed as Executive Director at Whitney M. Young, Jr. Health Center, Inc. in Albany, New York from October 1983 to present.

During the period August 21, 1981 to present, plaintiff made numerous applications for employment with the Medical College of Ohio. Plaintiff's first employment application for an executive level position was submitted on or about August 21, 1981. Defendants' reply was "we have no openings in Hospital Administration at this time . . . Your resume will be kept on file in the event of such a vacant position in the future."

Subsequently, in response to advertisements in The Toledo Blade, plaintiff applied for the position of Assistant to the President on or about September 21, 1981, Administrative Assistant-Psychiatry Department, on or about November 1, 1981, and Ambulatory Care Director, on or about November 22,

1981. After not receiving a response to his applications, plaintiff submitted a second application for the position of Assistant to the President on or about November 12, 1981. After not receiving a response to any of the applications, plaintiff submitted another application by certified mail on December 2, 1981.

In response to an advertisement in Hospitals, plaintiff submitted an application for the position of Executive Director on or about January 14, 1982. After not receiving a response to his application, plaintiff submitted a second application on or about February 9, 1982. In each case set forth above, plaintiff received no response to his application and/or was denied the position; further, in each instance the position was filled by a white person and/or a person younger than plaintiff; and in each case, plaintiff was equally or more qualified than the person hired. Defendants allege that the position of Ambulatory Care Director was never filled.

As a result of being denied employment, plaintiff

filed three charges of employment discrimination based upon age, race and/or retaliation against the Medical College of Ohio with the Equal Employment Opportunity Commission (EEOC). The EEOC found probable cause that defendants engaged in unlawful employment discrimination against plaintiff.

Plaintiff now seeks redress for defendants' unlawful acts under Title VII, 42 U.S.C. Subsection 2000(e), et seq.; Title VI, 42 U.S.C. Subsection 2000(d) et seq.; and the Age Discrimination in Employment Act, 29 U.S.C. 621 et seq..

STATEMENT OF LAW

This is a civil action instituted by Curtis Wrenn, a black male, against State of Ohio Medical College of Ohio (MCO), and the Board of Trustees of MCO. The gravemen of plaintiff's claim alleges a violation of his rights because of his race, black, and because of his age 55 years. There was also visited upon plaintiff perpetrated retaliatory scheme orchestrated by defendants.

The facts clearly show plaintiff is a black American whose age places him in a protected group. He applied for not one, but several jobs for which he was well qualified, but in spite of his qualifications and experience, he was rejected by defendants while they continued to search for persons of plaintiff's qualifications. See McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973).

Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. Subsection 2000e 3(a), provides, in relevant part, that:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his

> employees or applicants for employment...because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under his subchapter."

To establish a prima facia case of retaliation against plaintiff it is not necessary that the person charged by plaintiff be the same person against whom plaintiff now charges retaliation. All that is necessary is that a charge has been made, and this can include a former employer. Barela v. United Nuclear Corp., 462 F.2d 149 (10th Cir. 1972). Womack v. Munson, 619 F.2d 1292, 22 FEP 1079 (8th Cir. 1980) cert. denied 450 U.S. 979 (1981). Further, it has been held that adverse action taken by an employer within six (6) months of the dismissal of administrative proceedings on a charge of discrimination is presumed to be based upon retaliatory motive. Hochstadt v. Worcester Foundation for Experimental Biology, 425 F. Supp. 318 (D. Mass. 1976). An employer's refusal to hire an applicant because he had filed charges with an

agency such as EEOC constitutes illegal retaliatory discrimination. East v. Romine, Inc., 518 F.2d 332 (5th Cir. 1975). Clearly, then, in the actions of defendants in failing to hire plaintiff on four distinct occasions after his filing of his charge of discrimination with the Ohio Civil Rights Commission, one can infer that the basis of the non-hire was retaliation against him for having filed the charge.

In a retaliation case, the plaintiff has the initial burden of proving a prima facia case of retaliation. The burden then shifts to defendant to establish a legitimate reason for its action. If the defendant can do so, then plaintiff has the burden of showing defendant's reason to be pretestual. The Sixth Circuit in Sutton v. National Distillers Products, 445 F. Supp 1319, 16 F.E.P. 1031 (S.D. Ohio 1978), aff'd 628 f.2d 936 (6th Cir. 1980) found that a prima facia case of retaliatory discrimination could be established if the plaintiff's participation in a protected activity "(1) played any part in the challenged action, (2)

played a substantial factor in the challenged action, (3) was the principal, though not the sole reason for the employer's action, (4) or whether or not the adverse employment action would have taken place had there been no protected activity." [emphasis added]. The southern District of Ohio had adopted the position that if the protected activity played any part in the challenged action, unlawful retaliation can be presumed.

Kornbluh v. Stearns and Foster Co., 73 F.R.D. 307, 14 F.E.P. 847 (S.D. Ohio 1976). The Supreme Court, however, supports the "but for" test set forth in the fourth standard in the Sutton case, supra. Thus, plaintiff herein must show that he engaged in a protected activity, that defendants were aware of the protected activity, that plaintiff did not receive the position for which he applied, and that the protected activity was within such period of time that the Court can infer retaliatory motive. Hochstadt, supra.

An inference of retaliatory discrimination is created if, as in the instant case, plaintiff was

equally or better qualified for the position than other applicants or if the position remains open after his application. Stinson v. Tennessee Department of Mental Health and mental Retardation, 553 F. Supp. 545 (M.D. Tenn. 1982). The Stinson case also stands for the proposition that, if plaintiff establishes a prima facia case of employment discrimination and defendant attempts to rebut same, if the legitimate reasons for the defendants' actions can be eliminated, it is more likely than not that the defendant-employer based his decision of impermissible consideration. In cases such as the instant one which involve issues of retaliation and pretextuality, it is sufficient that plaintiff show that retaliation played any part in defendants' refusal to hire him, and a showing of another sufficient cause does not remove the issue. Kornbluh, supra.

In the instant case, there can be no dispute that plaintiff filed charges of employment discrimination (a protected activity) against his former employer, for it made wide-spread publicity in Toledo, Ohio.

Given the above, and given the fact that persons with lesser education and experience than plaintiff were hired for the positions for which he applied, one can infer that defendants had a retaliatory motive for not hiring plaintiff. This motive becomes more apparent given the fact that one of the positions was never filled.

Courts have recognized that proof of overt racial discrimination and retaliation in employment is seldom made by direct evidence. United States v. Jacksonville Terminal Company, 451 F.2d 418 (5th Cir. 1971), cert. denied 406 U.S. 906 (1972). An employee or applicant is at an inherent disadvantage in gathering hard evidence of employment discrimination. Senter v. General Motors Corporation, 532 F.2d at 527. It is for this reason that courts in general acknowledge the value of circumstantial evidence in establishing discrimination. See, Afro American Patrolmen's League v. Duck, 503 F.2d 294 (6th Cir. 1974). Ordinarily the comparative qualifications of the candidates are relevant, and plaintiff must

establish he is at least equally qualified as the employee chosen. McDonnell-Douglas Corp., supra.

Equitable relief in the form of back pay is authorized as to plaintiff should he prevail in this matter by 42 U.S.C. Subsection 2000(e) et seq. pursuant to 28 U.S.C. Subsection 1343(4) which provides in relevant part that a Federal Court may award "damages or...equitable or other relief under any act of Congress providing for the protection of civil rights." See, also, Johnson V. Railway Express Agency, Inc., 421 U.S. 454, 95 S. Ct. 1716, 44 L.Ed 195 (1975). Plaintiff is entitled to back pay, including wages, fringe benefits, insurance and interest in such an amount as to make him whole for the discriminatory treatment to which he was subjected by defendants. Hatton v. Ford Motor Co., 508 F. Supp. 620, 25 F.E.P. 314 (E.D. Mich. 1981), E.E.O.C. v. Wooster Brush Co., 26 F.E.P. 1602 (N.D. Ohio 1981), Satty v. Nashville Gas Co., 18 F.E.P. 493 (M.D. Tenn. 1978). Given a finding of unlawful discrimination, "back pay should be denied only for reasons which, if applied generally, would not

frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975). "A court should award back pay unless exceptional circumstances indicate otherwise." Crosby v. United States, 427 F. Supp. 547 (S.D. Ohio 1979). Plaintiff is also entitled to pre-judgment interest, Singer v. Mahoning County Board of Mental Retardation, 379 F. Supp. 986 (N.D. Ohio 1974), aff'd, 519 F.2d 748 (6th Cir 1975), Ramey v. Cincinnati Enquirer, inc., 508 F.2d 1188, (6th Cir. 1974), and plaintiff is also entitled, should he prevail in this case, to an award of attorney fees. Such an award is proper pursuant to 42 U.S.C. Subsection 2000(e)-5(k), providing that:

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

The rationale for awarding attorney fees to prevailing plaintiffs in civil rights actions was first enunciated by the Supreme Court in Newman v. Piggy Park Enterprises, 390 U.S. 400 (1968), and calls for an award of attorney fees "ordinarily" absent "special circumstances". Costs of litigation are also a proper element in the award, even though they are not expressly mentioned in the statute. E.E.O.C. v. I.U.E., Local 758, 631 F.2d 81 (6th Cir. 1980).

Title VI of the Civil Rights Act of 1964, Subsection 601 provides, in relevant part, that:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

A private right of action under Title VI has been found to exist. See Cannon v. University of Chicago, 441 U.S. 677, 99 S. Ct. 1946, 60 L.Ed. 2d 560 (1979). The same standards apply in a Title VI case as those in a Title VII case, and the same remedies are available to a Title VI litigant as are

available to a Title VII litigant. Guardians Association of the N.Y.C Police Department, Inc. v. Civil Service Commission, 466 F. Supp. 1273 (S.D.N.Y. 1979) rev'd on other grounds, 633 F.2d 232, 23 F.E.P. 677 (2d Cir. 1980), cert. den. 25 F.E.P. 1683 (1981).

The requirements for establishing a prima facia case of age discrimination in employment and the burden of proof have been held to be essentially the same as for a Title VII action. Loeb v. Textron, 20 F.E.P. Cases 29 (1980). The protected age group in ADEA cases is 40 through 69. Plaintiff clearly falls within that protected class. 29 U.S.C. Subsection 623 provides, in relevant part, that:

> "(a) It shall be unlawful for an employer--(1) to fail or refuse to hire...an individual...because of such individual's age..."

The BFOQ (bona fide occupational qualification) defense cannot be asserted by defendants herein for their failure to hire plaintiff. The BFOQ defense is to be narrowly construed. Dothard v. Rawlinson, 433 U.S. 321, 97 S. Ct. 2720, 53 L.Ed. 2d 786 (1977). Safety and efficiency in performing a job

are the main standards which comprise the BFOQ defense. Houghton v. McDonnell Douglas Corp., 553 F.2d 561 (8th Cir. 1977), cert. den, 434 U.S. 966 (1977). The positions for which the plaintiff in the instant action applied do not require activity such to make safety and efficiency based on age of major importance.

The plaintiff to prevail on his claim of age discrimination, he must prove that (1) he is a member of the protected age group (40-69 years of age), (2) he was adversely affected by an employer's action, and (3) the employer took such action because of plaintiff's age. Plaintiff need not prove that age was the sole factor in the adverse employment decision. Laugesen v. Anaconda Co., 510 F.2d 567 (6th Cir. 1975).

A successful ADEA plaintiff is entitled by the Act to compelled employment, reinstatement, promotion and back pay. Courts are split as to whether compensatory damages for pain and suffering are also recoverable. Pursuant to 29 U.S.C. Subsection 626(b), a successful ADEA plaintiff who

has shown a willful violation of the Act is entitled to liquidated damages in the amount of twice the actual damages incurred. A willful violation in an ADEA case has been defined as:

> "violations which are intentional, knowingly and voluntarily made as distinguished from accidental, innocent or for good reason acts.
>
> The court believes that willful goes beyond conduct that can be characterized as careless, or unknowing, or unintentional" Hodgson v. Ideal Corrugated Box Co., 8 E.P.D. Subsection 9805 at 6373 (N.D. W.Va. 1974).

And the Third Circuit has held that a showing that the employment action was made voluntarily and with reckless disregard of the consequences constitutes willfulness. Wehr v. Burroughs Corp., 619 F.2d 276 (3rd Cir. 1980).

Should plaintiff prevail on his age claim, he would be entitled to an award of attorney fees over and above any other award. Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240, 93 S. Ct. 1612, 44 L.Ed 2d 141 (1975).

CONCLUSION

Based upon evidence to be presented at trial, plaintiff will show that he has met each and every element necessary to establish a prima facia case of unlawful retaliatory discrimination and/or race and/or age discrimination and that any reason that defendants could put forth as legitimate for plaintiff's non-hire is pretextual. Thus, plaintiff must prevail on his claim of unlawful employment discrimination.

Should plaintiff prevail in this matter, his counsel reserve the right to submit affidavits and time and expense statements setting forth attorney fees and expenses and/or hereby request an evidentiary hearing on the amount of same.

Respectfully submitted,

/s/James H. Banks
Trial Attorney for Plaintiff
620 Alum Creek Drive
Suite 201
Columbus, Ohio 43205
(614) 252-0752

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was duly served upon Richard W.

Ross, Assistant Attorney General, and William J. Steele, Assistant Attorney General, State Office Tower, 30 East Broad Street, Columbus, Ohio 43215, personally, this 18th day of January, 1985.

/s/James H. Banks
Trial Attorney for Plaintiff

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE:	
CURTIS L. WRENN	
Petitioner,	No. 86-3084
	RESPONSE TO PETITION FOR A WRIT OF MANDAMUS

* * * *

WALINSKI, J.

Pursuant to the order of the Court of Appeals for the Sixth Circuit dated March 14, 1986 requiring a response to the writ of mandamus filed January 27, 1986, the respondent notes with dismay that the petitioner has filed a notice of appeal on February 27, 1986.

The petition for a writ of mandamus is moot, since the remedy sought by petitioner was granted on February 13, 1986 by this respondent denying petitioner's motion for summary judgment which is properly before the Court of Appeals on appeal.

For further response, the District Court forwards a listing of all the petitioner's

litigation as of April 1, 1986, together with the docket sheets of the causes to emphasize the petitioner has not followed the rules of procedure in his pre se litigation. The petitioner appeals non-final orders, and then seeks mandamus to get immediate attention to his complaint. The petitioner assumes that his allegations in the complaint are factually true and indefensible, requiring judgment on the complaint with no proof necessary

The core case of petitioner's many complaints is C 81-571 wherein petitioner is represented by counsel, and involves petitioner's removal as director of the Toledo Mental Health Center. Many of the following complaints arise out of the alleged detrimental publicity making petitioner attempts to seek employment in related mental health fields unsuccessful in the state. Case No. C 81-571 was set for trial January 14, 1986 and reset to November 11, 1986 at the request of petitioner's counsel. The remaining causes of action against various combinations of individuals

and entities were stayed pending the trial in the core case , by agreement of counsel where involved.

The Court of Appeals should note that the last case filed, C 83-803, is again against the Ohio Department of Mental Health, which was named defendant in C 81-571, the first case filed.

Accordingly, the respondent prays that the petition for a writ of mandamus be dismissed as moot.

/s/signature illegible
SENIOR U.S. DISTRICT JUDGE

Toledo, Ohio.
April 9, 1986

Judge	Case Number	Caption	Status
NJW	C 81-571	Wrenn v. Lawrence P. Benson, et al	Pending-NJ Trial 11/18/86
JWP	C 81-665	Wrenn V. Myers R. Kurtz, et al.	Stayed pending C 81-571
JWP	C 81-701	Wrenn V. Sylvester M. Gould, Jr. et al	Appeal pending
NJW	C 82-7	Wrenn v. J. Clay Smith, et al.	Stayed pending C 81-571
NJW	C 82-12	Wrenn v. Bd of Directors, et al.	Stayed pending C 81-571
DJY	C 82-13	Wrenn v. Thomas M. Wernert, et al.	Dismissed 3/31/82
JWP	C 82-205	Wrenn v. State of Ohio, et al.	Consolidated with C 81-665
DJY	C 82-206	Wrenn v. Sylvester M. Gould, et al.	Dismissed 7/22/82
JWP	C 82-207	Wrenn v. Thomas M. Wernert, et al.	6th Cir. Mandate 6/18/85 Dist. Ct. Affirmed
JWP	C 82-256	Wrenn v. State of Ohio, et al.	Stayed pending C 81-571
NJW	C 82-257	Wrenn v. Robert P. Nimmo, et al.	Dismissed 2/8/82

NJW	C 82-326	Wrenn v. J. Clay Smith, et al.	Dismissed 2/8/82
NJW	C 82-335	Wrenn v. John P. Rogers, et al.	Stayed pending C 81-571
JWP	C 82-624	Wrenn v. Clarence Thomas, et al.	Dismissed 1/19/83
JWP	C 82-670	Wrenn v. Lucas Cty. Mental Health Bd.	6th Cir. Mandate 9/17/84 Dist. Ct. affirmed
JWP	C 82-742	Wrenn v. St. Charles Hospital	6th Cir. Mandate 2/28/86 Dist. Ct. affirmed
JWP	C 82-748	Wrenn v. Thomas M. Wernert, et al.	Consolidated with C 82-207
NJW	C 83-201	Wrenn v. Sylvester M. Gould, et al.	Appeal pending
NJW	C 83-493	Wrenn v. Dept of Mental Health etc., et al.	Appeal pending
JWP	C 83-803	Wrenn v. Ohio Dept. of Mental Health etc., et al.	Stayed pending C 81-571